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91-524

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF
THE UNITED STATES
1991 TERM

Toni WilsonAppellant

v.

Ledger D. KauffmanAppellee

Appeal from the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTION-PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution is violated when the sole black juror at a black litigant's trial is removed by opposing counsel by peremptory challenge after the trial court had required opposing counsel to come forward with a racially neutral explanation for the challenge and the Indiana Court of Appeals has held that the burden is on the minority litigant to prove that the challenge was based on race.

TABLE OF CONTENTS

	<u>Page</u>
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Official Reports of Opinions by Other Courts	1
Jurisdiction	1
United States Constitutional Provisions Involved	3
Statement of the Case	3
Federal Due Process Raised	6
The Issue Presented is Substantial	8
Appendix	
(a) Decision by Indiana Court of Appeals - this appeal	22
(b) Voir Dire Exam of Black Juror by Defense Counsel	46
(c) Notice of Appeal to the United States Supreme Court	52

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Batson v. Kentucky</u> (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69	7, 16, 23, 25, 27, 30, 31
<u>Edmonson v. Leesville Concrete Company</u> (1991) 111 S.Ct. 41.	25
<u>Ford v. Georgia</u> (1991) 111 S.Ct. 850.	9
<u>Wilson v. Kauffman</u> (1990) 563 N.E.2d, 610, 614	13

**OFFICIAL REPORTS OF
OPINIONS BY OTHER COURTS**

The opinion of the Indiana Court of Appeals, from which Toni Wilson appeals appears in the Appendix hereto, pp. 18-45, *infra*, and is reported at Ind. App., 563 N.E.2d 610.

JURISDICTION

The judgment of the Indiana Court of Appeals which placed the burden on Wilson to establish racial discrimination in jury selection after the trial court had ruled that opposing counsel was required to state a racially-neutral reason for the

peremptory challenge of the sole black juror on Wilson's panel was entered on November 26, 1990. Appellant filed a Petition for Rehearing on December 13, 1990, before the Indiana Court of Appeals which was denied on January 18, 1991. Appellant filed a Petition for Transfer to the Indiana Supreme Court on February 7, 1991, which was denied on June 27, 1991.

Appellant timely filed a Notice of Appeal to the United States Supreme Court with the Clerk of the Indiana Supreme Court and Court of Appeals on September 24, 1991.

This appeal is being docketed in this court within ninety (90) days from the denial of Transfer by the Indiana Supreme Court. The jurisdiction of this court is

invoked under 28 U.S.C. Sec. 1257(a).

UNITED STATES

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment: (Due Process and
Equal Protection) Sec. 1:

. . . .No state shall abridge
the privileges or immunities of
citizens of the United States;
nor shall any state deprive any
person of life, liberty or pro-
perty, without due process of
law; nor deny to any person wi-
thin its jurisdiction the equal
protection of the law.

STATEMENT OF THE CASE

Toni Wilson was injured in an auto-
mobile collision on October 13, 1983, and
brought a personal injury action against
Ledger D. Kauffman for damages in the

Elkhart Superior Court, Division III. On February 1, 1989, the trial court empaneled a jury which contained one female black juror by the name of Charlie Pulluaim. Toni Wilson is also black. Subsequent to the interrogation of juror Pulluaim by Wilson's counsel, the trial court called counsel to the bench and instructed them by giving them a card which stated that any challenge of juror Pulluaim would have to be for a racially-neutral reason. Juror Pulluaim was then questioned by Kauffman's counsel and answered each of the questions correctly. Juror Pulluaim had stated that she had heard of Toni Wilson but was not personally acquainted with her. Following the interrogation of juror Pulluaim by Kauf-

fman's counsel, Kauffman's counsel then challenged juror Pulluaim peremptorily and Wilson's counsel objected. The court then called a recess and instructed counsel to submit their positions in writing. Wilson's counsel stated that the sole reason for the challenge was that the juror was black and Toni Wilson was black and that there was no evidence the juror was not fully qualified and that Kauffman had failed to establish a racially neutral reason for removing juror Pulluaim. Kauffman's counsel cited his reasons for the challenge that juror Pulluaim did not appear to understand his questions, that she knew of Toni Wilson and that the white juror next in line was the wife of a physician and medical evidence was an issue

in the case. The trial court told counsel at the bench that juror Pulluaim did not appear to understand the questions of Kauffman's counsel, although the transcript shows she answered each question correctly. The trial court sustained the challenge.

FEDERAL DUE PROCESS RAISED

The Appellant raised the United States Constitutional questions presented by this appeal before the trial court by contending that Kauffman did not meet his burden of proof to establish racial neutrality.

On appeal to the Indiana Court of Appeals, Wilson asserted that the trial

court had correctly applied the Batson Rule¹ to a civil trial² and argued that the burden of proof to establish racial neutrality of a peremptory challenge was upon Kauffman. Wilson argued that the trial court's adoption of this procedure was consistent with the Batson rule and that Kauffman had failed to meet his burden.

The Indiana Court of Appeals adopted Wilson's argument that the trial court correctly applied the Batson Rule to a civil case, holding that there is signif-

¹ Batson v. Kentucky (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69.

² Edmonson v. Leesville Concrete Company (1991) 111 S.Ct. 41.

cant state action on the part of the trial judge who is a state actor in acting to sustain a statutorily granted peremptory challenge. The Indiana Court of Appeals, however, erroneously rejected Wilson's appeal by holding that the burden was on Wilson to show facts that give rise to an inference that the challenge was based on race and that Wilson had failed to meet this burden of proof. There was no discussion in the opinion as to any burden on Kauffman to establish that his challenge was racially-neutral, which was the standard placed on both counsel by the trial court in regulating the voir dire examination.

THE ISSUE PRESENTED IS SUBSTANTIAL

Fundamental to a free citizenry is the right to trial by jury before jurors drawn from a cross-section of the community. Historically, peremptory challenges could be made for any reason but Indiana Law has held that there is no right to a peremptory challenge. Previous case law which allowed peremptory challenges to exclude blacks from juries has been overturned and replaced with the doctrine that jury selection must be conducted on a race-neutral basis. This court has left it to trial courts to implement the Batson rule in the jury selection process³ and the trial court in this case implemented it by requiring the challenge to be for a

³ Ford v. Georgia (1991) 111 S.Ct. 850.

racially neutral reason. The adoption of this practice by the trial court effectively relieved Wilson of any further burden of establishing a prima facie showing of discrimination and shifted the burden to Kauffman to come forward with a racially neutral reason. The Indiana Court of Appeals has chosen to place the burden back on Wilson to prove discrimination instead of requiring Kauffman to demonstrate facts within his knowledge as to why the only black juror should be removed. The selection of an impartial jury would indeed be a vain and illusory ideal if the minority litigant is required to meet a burden of proof beyond a prima facie showing as the Indiana Court of Appeals is now requiring. Kauffman's

challenges were not race neutral. His contention that juror Pulluaim did not understand the questions is not supported by the record, which showed no lack of understanding. The only thing that distinguished juror Pulluaim from the way the other jurors answered questions was that she was black and spoke with a minority accent. Kauffman's second contention that the juror "knew of" Toni Wilson is not free of race-bias. The juror stated she did not personally know Wilson. If it is a sufficient basis for a challenge to argue that a juror knows of a litigant, it is difficult to see how a black litigant could ever have a jury with members of her own race on the panel. In a small community where the members of a black minority

live in the same area of town it is expected that members of the minority would "know of" each other. Using this as a basis for a challenge is the same as saying that belonging to the minority community is a basis for a peremptory challenge. This type of challenge would necessarily exclude large members of minority persons from jury service and would deprive the litigant of the constitutional right to jury selection on other than race-identity qualifications. The third basis of Kauffman's challenge was the most outrageous, that the white wife of a physician was more qualified than the black juror to judge a personal injury case. Even the Indiana Court of Appeals agreed that this challenge alone would not have

survived the Batson test.⁴ Counsel for Kauffman did not ask the black juror anything about her knowledge of medicine so as to compare her to the physician's wife. Finally, Kauffman did not attempt to challenge the juror at all on the most obvious basis for a challenge, namely, that the juror had previously had a personal injury claim herself. Instead, all three reasons given for the challenge related to race based criteria: 1) Speech patterns in answering questions; 2) Living in a minority community so as to know of another black resident of the community, and 3) The alleged superior ability of the physician's white wife to judge a personal

⁴ Wilson v. Kauffman (1990) 563 N.E.2d 610, 614.

injury case, who was of a presumably superior racial and social class than the black juror.

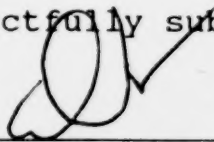
To place the burden on the black litigant to explain the illogic of such a challenge is not where the burden belongs. The trial judge was satisfied that enough of a prima facie showing existed to require counsel to come forward with a racially neutral reason for challenge of the only black juror. The right to an impartial jury of one's peers is so important that the burden belongs on the party challenging the minority juror to explain his challenge by clear and convincing evidence. The minority litigant cannot look into opposing counsel's mind to fathom all devious motives. Considering that com-

ments on jury challenges must be made with little time for reflection or investigation into the background of a juror, it is appropriate that the party desiring to create an all-white jury for a black litigant should have a good reason for doing so, if not a challenge for cause, at least the burden of coming forward with a good and sufficient reason. The system of peremptory challenges is not an absolute right as the trend in the law is to require some rationality in the process so as to eliminate the opportunity to challenge for a racially discriminatory reason. Such an opportunity continues where the burden is on the minority party rather than the challenging party to justify the reason for the challenge. The Indiana

Court of Appeals opinion encourages continued challenges of black jurors by white litigants in placing the burden on the minority litigant to "prove" the challenge is not race-neutral. This opinion is a step back in time and ignores the intent of the Batson rule that the burden shift to the challenging party to come forward with a race-neutral explanation, which is lacking in this case.

For those foregoing reasons, this court should note probable jurisdiction of this appeal and grant certiorari.

Respectfully submitted,



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APPENDIX

IN THE
COURT OF APPEALS OF INDIANA

TONI WILSON)	
APPELLANT,)	
)	NO. 20A04-8909-CV-398
v.)	
LEDGER D. KAUFFMAN,)	
APPELLEE.)	

COURT OF APPEALS OF INDIANA,
FOURTH DISTRICT.
NOVEMBER 26, 1990.
REHEARING DENIED JAN. 18, 1991

Motorist brought personal injury action against truck driver. The Elkhart Superior Court, Worth N. Yoder, J., rendered judgment for motorist and she appealed. The Court of Appeals, Miller, P.J., held that: (1) although Batson applied to civil cases, plaintiff failed to show that defendant's exclusion of only black venireperson was due to racial discrimination; (2) any error occurring in admission of medical report was harmless; and (3) jury award was not inadequate.

Affirmed.

Charles C. Wicks, Elkhart, for appellant.
John D. Ulmer, Bryant C. Haney, Yoder,
Ainlay, Ulmer & Buckingham, Goshen, for
appellee.

MILLER, Presiding Judge.

Toni Wilson, Plaintiff-appellant, a
black female, obtained a jury award of
\$10,000 for injuries she sustained when a
car driven by Ricky Chapman was pushed
into her car by Ledger Kauffman, Defen-
dant-appellee. Wilson appeals the jury
award in her favor, raising the following
issues:

I. Whether the court erred in gra-
nting defendant's peremptory challenge to
juror Pulluaim, who is black.

II. Whether the court erred in de-
nying Wilson's request for a limiting
instruction, instructing the jury that the
medical report of Dr. Gupta, who did not

testify at trial, was admissible only because it was used by Dr. Papadopoulos, whose videotaped deposition was shown at trial, in arriving at his opinion of Wilson's injuries are not for the truth of the matters asserted in the report.

III. Whether the jury verdict of \$10,000 was inadequate.
We affirm.

FACTS

The facts most favorable to the judgment are as follows:

On October 13, 1983, Toni Wilson (Wilson) was traveling north on Benham Avenue in Elkhart, Indiana, when she stopped behind a car that was stalled on the roadway. A car driven by Ricky Chapman stopped behind Wilson's car. Ledger Kauffman was also travelling north on Benham when he saw the Chapman vehicle stopped ahead of him. Kauffman was unable to stop his truck in time to avoid hitting

Chapman's car. As a result of the impact between the Kauffman and Chapman vehicles, Chapman's care was forced into the back of Wilson's Car.

On October 1, 1989, the court impaneled a jury which contained one black juror, Charlie Pulluaim. While Kauffman was questioning Pulluaim, the trial judge instructed Kauffman that if Pulluaim was excused, it would have to be for a racially neutral reason. After Kauffman decided to strike Pulluaim, the court asked Kauffman to submit his reasons for excusing Pulluaim in writing. Wilson was also permitted to submit her objection in writing, but the court found Chapman's reason (sic) for excusing juror Pulluaim to be racially neutral.

During trial, the videotaped deposition of Dr. Papadopoulos, one of Wilson's physician, was shown to the jury. During his deposition, Dr. Papadopoulos stated

that he considered a report prepared by Dr. Gupta, another of Wilson's physicians, in forming his opinion about Wilson's injuries. The report was offered into evidence by Kauffman and admitted over Wilson's objections. Wilson then requested an instruction to the jury that Dr. Gupta's report was offered not for the truth of the matters asserted in the report, but because it was used by Dr. Papadopoulos in arriving at his opinion. Her request was denied.

After the trial, the jury returned a verdict in favor of Wilson and granted her damages in the amount of \$10,000.

DECISION

The first issue raised by Wilson is whether the court erred in granting Kaufman's peremptory challenge of juror Pulluaim, the only black person on the venire. Wilson contends that she was denied equal protection of the laws when the

court permitted Kauffman to peremptorily strike Pulluaim. She cites Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, to support her argument that, once she made a prima facie case of purposeful discrimination, the burden was on Kauffman to prove he was seeking to remove Pulluaim for a racially neutral reason, which he failed to do. Although Wilson recognizes that Batson is a criminal case, she argues it is nonetheless applicable to jury selection in civil cases.

Kauffman, on the other hand, argues that the holding in Batson is limited to jury selection in criminal cases. He asserts that in civil cases, only private actors are involved. Therefore, there is no state action, which is required before a constitutional violation may be found. Alternatively, he argues that Wilson failed to meet her burden of proving pur-

poseful discrimination as required by Batson. He also argues that Pulluaim was dismissed for a racially neutral reason.

[1,2] Private use of state-sanctioned private remedies does not rise to the level of state action. Tulsa Professional Collection Services v. Pope (1988), 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565. however, when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *Id.* In order for these to be state action, it must be determined that 1) the claimed deprivation has resulted from the exercise of a right or privilege having its source in governmental authority; and 2) there is some figure present in the action who can be fairly characterized as a state actor. Lugar v. Edmondson Oil Co. (1982), 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482.

[3] It is clear that the first require-

ment has been met. The claimed deprivation has resulted from a litigant's use of a statutorily¹ granted peremptory challenge. *Id.* However, the question of whether there is some figure who can be characterized as a state actor is more difficult to answer.

In a criminal case, the state actor is the prosecutor who exercises the peremptory challenge. Batson, supra. In civil cases, a private litigant exercises the challenge. The only other possible state actor, therefore, is the court. However, in Edmonson v. Leesville Concrete Co., Inc. (1990), 5th Cir., 895 F.2d 218, cert. granted (1990), ----U.S.----, 111 S.Ct. 41, 112 L.Ed.2d 18, the court held that when the court allows a juror to be removed peremptorily, it is exercising a ministerial function of permitting venire

¹ See Ind. Code 34-1-20.5-3.

member cut by counsel to depart. According to the Edmonson court, this purely ministerial action is too insignificant to be considered state action.

In Fludd v. Dykes (1989), 11th Cir., 863 F.2d 822, reh'g denied, (1989), 873 F.2d 300, cert. denied, (1989), ---U.S.---, 110 S.Ct. 201, 107 L.Ed.2d 154, the court reached the opposite result. That court held that when blacks are excluded from jury service because of their race, it is the court and not the attorney who is the actor. *Id.* The court reasoned:

"Thus until the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned. The trial judge's decision--to proceed to trial, over the party's objection, with a jury selected from the venire on the basis

of race--is the one that harms the objecting party. In overruling the objection, which informed the court that the peremptory challenger may be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of Batson to a civil suit."

Id. at 828. The trial court judge is the state actor because it is the trial court judge who must decide whether to excuse a juror over an objection by a party that the juror is being excused because of race. Therefore, there is significant action on the part of the judge--a state actor--to sustain a constitutional challenge.

The conclusion reached in Fludd is consistent with the Supreme Court's holding in Tulsa Professional Collection Services, supra, where the court was faced with a constitutional challenge to a nonclaim provision of Oklahoma's probate code which barred creditors' claims against an estate unless they are presented to the executor within two months of the publication of notice of the commencement of probate proceedings. Pope, the executrix of the estate, argued that there was no state action because the nonclaim statute was merely a self-executing statute of limitations. The court, however, found significant state action because of the involvement of the probate court: the probate court is intimately involved in the administration of the estate; the nonclaim statute becomes operative only after probate proceeding has been initiated; and the court appoints the executrix

of the estate. Id.

Likewise, there is significant state involvement here. The court summons the venire, the right to the peremptory challenge is granted by statute and the statute is only significant once the legal proceedings have begun. More importantly, it is the judge who, when faced with a situation such as the one here, must decide whether there exists a racially neutral reason for excusing the juror.

Our Indiana constitution guarantees the right to trial by jury in civil cases. Art. 1 Sec. 20. The selection of persons to be drawn as prospective jurors is the duty of the jury commissioners, who must select those persons "without favor or prejudice". I.C. 33-4-5-1. The selection process itself is governed by statute and is designated to be fair and impartial. See e.g. I.C. 33-4-5-2; I.C. 33-4-5-9. If a litigant were permitted to exercise

peremptory challenges to strike jurors because of their race, these provisions would be rendered a nullity.

In summary, we agree with the Fludd court that there is state action involved in the jury selection process in a civil case and hold, consistent with other jurisdictions,² that Batson is applicable to jury selection in civil cases.

(4) Under Batson, the litigant challenging the use of a peremptory challenge must establish a prima facie case of purposeful racial discrimination in the selection of the jury by showing that: 1) she is a member of a cognizable racial group; 2) the prosecution has used a peremptory challenge to remove from the

² Clark v. City of Bridgeport (1986), 645 F.Supp. 890; Thomas v. Diversified Contractors (1989), Ala., 551 So.2d 343; Williams v. Coppola (1986), 41 Conn.Sup. 48, 549 A.2d 1092. Cf. Esposito v. Buonome (1986), 642 F.Supp. 760; Chavous v. Brown (1990), S.C., 396 S.E.2d 98.

venire members of the litigant's race; and 3) the facts and circumstances of the case raise an inference the exclusion was based on race. Batson, supra; Phillips v. State (1986), Ind., 496 N.E.2d 87. Once the defendant has made this showing, the burden shifts to the other litigant to come forward with a neutral explanation for challenging the juror. The court must then determine whether the defendant has established purposeful discrimination. Phillips, supra.

It is not disputed that the first two criteria are met here-Wilson is black and Kauffman exercised a peremptory challenge to remove the only black person impaneled. Wilson has not shown, however, that the facts and circumstances of her case raise an inference the exclusion was based on race.

During voir dire of juror Pulluian, the trial judge gave Kauffman's counsel a

note telling him that he must give a racially neutral reason if he intend to strike Pulluaim. He permitted both Kaufman and Wilson an opportunity to present their views in writing. In her objection, Wilson did not point to any facts in the case, other than the fact that Wilson and Pulluaim were both black, to raise an inference that the discrimination was purposeful:

"Plaintiff objects to the exclusion of juror Charlie Pulluaim since it appears the real basis for the challenge is that the juror is black and the plaintiff is black. There is no evidence that the juror is not fully qualified and counsel for defendant has failed to establish a racially neutral reason for removing juror Pulluaim."

(R. 493).

(5) The fact that the only black juror has been excused through the use of

peremptory challenge does not raise an inference of racial discrimination. Thorne v. State (1988), Ind., 519 N.E.2d 566. Rather, the burden is on the objecting party to show facts that give rise to an inference that the challenge was based on race. *Id.* Wilson has failed to do so in this case.

(6) Kauffman gave the following reason for excusing Pulluaim:

"She did not appear to understand my questions, she knows of Toni Wilson, the next juror coming up is a wife of a physician-a lot of this case turns on medical information."

(R. 491). It is reasonable for a prospective juror who is acquainted with the litigant- to be dismissed. Splunge v. State (1988), Ind., 526 N.E.2d 977, cert. denied (1989), --U.S.--, 109 S.Ct. 3165, 104 L.Ed.2d 1028. Based on Pulluaim's response that she had heard of Wilson, the

judge could have found that Pulluaim was acquainted with Wilson. In addition, the trial court judge agreed that Pulluaim did not appear to understand Kauffman's questions. The trial court's decision as to Pulluaim's understanding of Kauffman's questions necessarily involved the evaluation of Pulluaim's demeanor and credibility. Because the trial court judge observed Pulluaim during voir dire, he is in the best position to judge Pulluaim's credibility and this court will not interfere with the trial court's decision. *Id.* The final reason given by Kauffman was that the next juror was the wife of a physician. Because there was considerable medical testimony, it is reasonable that, given the choice between an individual who is not familiar with medical terminology and who, being the spouse of a physician, might be familiar with medical terms,

Kauffman would choose the latter.³

Issue II

(7) Wilson next claims the trial court erred in refusing her request for a limiting instruction as to the admissibility of Defense Exhibit "B", a medial report prepared by Dr. Gupta. Dr. Papadopoulos, a physician who examined Wilson shortly after the accident, referred Wilson to Dr. Gupta, a neurologist. Dr. Gupta was not called as a witness. However, the video taped deposition of Dr. Papadopoulos was shown to the jury. During his deposition, Dr. Papadopoulos sta-

³ We note that Kauffman could have stuck any of the jurors on the panel in order to assure that the physician's wife was on the panel. Thus, we believe this factor alone would not have been sufficient to show that his reason for striking juror Pulluaim was not racially motivated. However, this factor, taken with the other two factors-that Pulluaim did not seem to understand Kauffman's question and that she was familiar Wilson-demonstrate that Kauffman's reason for striking Pulluaim was not racially motivated.

ted that he took Dr. Gupta's report into consideration in attempting to diagnose Wilson's injuries. After Dr. Papadopoulos' deposition was shown to the jury, Kauffman sought to introduce Dr. Gupta's report, to which Wilson objected as hearsay. When her objection was overruled, Wilson asked the court to instruct the jury that the report was not being placed in evidence to prove the truth of the matters contained in the report, but rather because Dr. Papadopoulos relied on the report in forming his opinion on Wilson's injuries. The court refused to give this instruction. Wilson now argues that, although the court did not err in permitting Dr. Papadopoulos to testify to the contents of the report, the court did err in permitting the report to be placed in evidence without an instruction limiting the purpose for which the report was being admitted. She argues that without such an

instruction, the jury would assume the report was admitted to prove the truth of the matters asserted in the report, thereby violating heresay rules. Kauffman, on the other hand, argues that the court did not err in refusing to give Wilson's instruction because the report was not inadmissible heresay. He cites Wilber v. State (1984), Ind., 460 N.E.2d 142, in support of his argument.

Traditionally, courts have excluded expert testimony which was based on information received from third parties prior to testifying. 13 Miller, Indiana Practice Sec. 703.104 (1984). Indiana, however, has abandoned that rule. For example, in Wilber, supra, Dr. Berg, a forensic pathologist testified as to his opinion of the cause of the victim's death. Dr. Berg's testimony referred directly to the content of medical reports prepared by the treating physician. The

court held that even though the treating physician's report may be admissible, the content of the report was admissible in conjunction with the coroner's findings. The court reasoned that:

"Such reports are routinely relied upon by forensic pathologist in arriving at their opinions as to cause of death, and when presented to the trier of fact by such persons at trial, in this form and manner, and for this purpose, testimony reflecting their content is not heresay." Id. at 143. See also Wickliffe v. State (1981), Ind., 424 N.E.2d 1007.

Here, however, the trial court permitted the report itself to be placed into evidence. The question of whether the reports on which experts rely are admissible was not answered in Wilber. The question was, however, addressed in Sills v. State (1984), Ind., 463 N.E.2d 228. A psychiatrist testified for the State as to

the defendant's sanity. The psychiatrist testified that he considered or relied on an electroencephalogram evaluation prepared by another doctor, a diagnostic evaluation of the defendant prepared for the Indiana Boys' School, and psychological and intelligence tests also prepared for the Boys' School. The State placed these reports into evidence over Sills' heresay objection. Our supreme court held that while it might have been better not to have admitted these documents directly into evidence, the judge did not exceed his discretion in doing so. The court stated:

"A review of the record in this case shows that the three exhibits were not being offered for the truth of the matters contained in them. Rather, they were being offered to establish the foundation of Dr. Duly's diagnosis. Before each exhibit was offered into evidence, Dr.

Duly was asked if it constituted material that he considered or relied upon in his evaluation of the defendant. No attempt was made to assert that the facts contained in the exhibits were true. While it might have been better not to have admitted these documents directly into evidence, see Smith v. State (1972) 259 Ind. 187, 285 N.E.2d 275, it was not necessarily an error to do so. In short, the trial judge has wide discretion in the admission of evidence. Under the circumstances of this case, we cannot say that the trial judge exceeded his discretion in allowing the state to admit these exhibits."

Id. at 234, 235.

Wilson does not dispute that Dr. Papadopoulos stated he relied on Dr. Gupta's report in forming his opinion. However, she points out that the following comment made by Kauffman during his clos-

ing argument demonstrates that the report was being offered to prove the truth of the matters contained therein:

"you will have Dr. Gupta's report back in the jury room and you can read it for yourself. He couldn't find anything" (R.340).

[8] This statement by Kauffman could be perceived as an attempt to assert the facts contained in Dr. Gupta's report as true. However, Wilson made no objection to this statement when it was made; therefore, she has waived any objection to it. Jester v. State (1990), Ind., 551 N.E. 2d 840. No other mention was made of Dr. Gupta's report by either party. Therefore, in line with Sills, we hold that, while it may have been better not to admit Dr. Gupta's report, it was not error for the court have done so.

Further, even if the trial court erred in admitting the report, it was not

reversible error. Reversible error cannot be predicated upon a trial court's admission or exclusion of evidence which is merely cumulative. Jordan v. Talaga (1989), Ind.App., 532 N.E.2d 1174. After reciting Wilson's symptoms, Dr. Gupta reached the following conclusion in his report.

" I am thus unable to demonstrate any evidence of radiculopathy [sic] [disease of the roots of spinal nerves. Gould Medical Dictionary 1148 (4th ed. 1979)] in this patient. It is interesting to note that her auto accident was relatively minor with minimal whiplash injury. The neck and back pain are most likely musculoskeletal in origin. I was not able to convince myself regarding her complaint of shoulder drooping. I do not believe this is neurological in origin. Her treatment will remain symptomatic. I am giving a trial of Naprosyn along with small doses

of diazepam"

(R. 399). Wilson herself testified Dr. Gupta could find nothing wrong with her. (R. 281). In addition, Dr. papadopoulos testified that neither he nor Dr. Gupta could discover anything wrong with Wilson. Therefore, Dr. Gupta's report was merely cumulative and the trial court did not commit reversible error in refusing to give a limiting instruction.

Issue III

[9] Finally, Wilson argues the jury award of \$10,000 was inadequate. At the very minimum, she claims she is entitled to \$11,796.81 because the uncontroverted evidence shows she incurred medial expenses of \$7,916.81 and lost income of \$3,880.00. She requests a new trial on the issue of damages.

This court will reverse an award as inadequate only when the amount of damages assessed by the jury is so low that it

shows the jury was motivated by prejudice, passion, partiality or corruption, or considered some other improper element in reaching its decision. Barrow v. Talbott (1981), Ind. App., 417 N.E.2d 917. Where the evidence is conflicting as to the nature, extent, and source of the injury, the jury is in the best position to appraise damages. Id.

Here, the nature, extent and source of Wilson's injuries is conflicting. Wilson, Wilson's sister, and Wilson's boyfriend all testified that Wilson was in considerable pain. Wilson testified she could no longer participate in the activities she enjoyed before the accident.

Dr. Hal Miller, who did not treat Wilson until almost five years after the accident, testified that he found Wilson suffered from a chronic cervical/thoracic/lumbar sprain, which he attributed to the sudden acceleration of her car that

occurred when her car was hit. (R. 184-85). However, Dr. Papadopoulos, who saw Wilson shortly after the accident, testified he could find nothing wrong with her. Finally, Wilson herself admitted that she had seen several doctors, including doctors at the Mayo Clinic, who could find nothing wrong with her. She also admitted to having injured her back about a year before the accident.

It is obvious, therefore, that the evidence as to the nature, extent and source of Wilson's injury is conflicting. Given this conflict, in addition to the fact that the jury award was close to what Wilson claims is the minimum due to her, it cannot be said that the jury was motivated by passion, prejudice, or some other improper motive. The jury award of \$10,000 is affirmed.

CONOVER and GARRARD, JJ., concur.

**VOIR DIRE EXAMINATION OF
CHARLIE PULLUAIM BY JOHN ULMER**

MR. ULMER: Ms. Pulluaim, you indicated you've been involved in some automobile accidents?

MS. PULLUAIM: Yes.

MR. ULMER: And in one you received some head injuries? And those were obvious? Did they incapacitate you for a period of time?

MS. PULLUAIM: No.

MR. ULMER: And you indicated that you were injured at work and received some serious injuries?

MS. PULLUAIM: Right.

MR. ULMER: What kind of injuries did you receive?

MS. PULLUAIM: I got my arm caught in a machine and it was broke and I had to have surgery twice.

MR. ULMER: And were you off for a

period of time?

MS. PULLUAIM: Yes. . . (indiscernible). . .

MR. ULMER: And are you now recovered?

MS. PULLUAIM: Yes.

MR. ULMER: Do you understand that by the mere filing of a lawsuit that does not establish the fact that plaintiff is entitled to recover?

MS. PULLUAIM: Yes.

MR. ULMER: And will you hold Ms. Wilson to the burden that if she's claiming injury she has to establish that they were caused by Mr. Kauffman's conduct?

MS. PULLUAIM: Yes.

MR. ULMER: And if she does not establish that, she can make no recovery? (No response.) Well, if the Court would so instruct you that before a plaintiff may recover, the plaintiff is responsible and has the burden of proving that the

injuries or damages she claims were caused by the defendant, would you follow that instruction. . .

MS. PULLUAIM: Yes.

MR. ULMER: . . .and if she has not established that burden, would you vote to not award her any money?

MS. PULLUAIM: I would have to hear all the facts before I could say.

MR. ULMER: That's fine. Now, you indicated that your prior occupation was a cashier at a Shell Station and at Burger King?

MS. PULLUAIM: Ah. . .about two years ago.

MR. ULMER: And what did you do at that. . .? -It was a self-serve store?

MS. PULLUAIM: Uh huh.

MR. ULMER: Did you ever have any run-in with any customers?

MS. PULLUAIM: Yes.

MR. ULMER: Is there anything. . .as

you're sitting there today, do you have any questions of either Mr. Wicks or myself that we haven't answered?

MS. PULLUAIM: No.

MR. ULMER: Okay. Thank you very much.

STATE OF INDIANA)	ELKHART SUPERIOR
)	SS: COURT NO. 3
ELKHART COUNTY)	
	CAUSE NO. 379
TONI WILSON,)	
Plaintiff)	
)	
v.)	CERTIFICATE OF
)	REPORTER
LEDGER D. KAUFFMAN,)	
Defendant)	

I, Cheryl Springer, Court Reporter for the Elkhart Superior Court No. 3, Goshen, Indiana, at the time of these proceedings, do hereby certify that I was the official reporter of said court, duly appointed and sworn to report the evidence in causes tried therein; that as such reporter, I took down in shorthand and also electronically recorded the entire proceedings in the cause set forth in the action hereof and that I did personally transcribe said transcript and certify that the foregoing is a true and correct transcript thereof.

Witness my hand and seal this 10th

day of August, 1989.

/S/Cheryl Springer
Cheryl Springer
Elkhart Superior Court 3
Elkhart County Courthouse
Goshen, IN 46526

IN THE SUPREME COURT OF INDIANA

NO. 20A04-8909-CV-398

TONI WILSON,)	Appeal from the
Appellant,)	Elkhart Superior
(Plaintiff Below),)	Court Div. II
)	
v.)	Cause No. 379
)	
LEDGER D. KAUFFMAN,)	The Honorable
Appellee,)	Worth N. Yoder,
(Defendant Below).)	Judge.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Toni Wilson, the Appellant above named, hereby appeals to the Supreme Court of the United States from the denial of Appellant's Petition for Transfer by the Indiana Supreme Court on June 27, 1991, which said Denial of Transfer affirms the decision by the Indiana Court of Appeals rendered on November 26, 1990.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(a).

The Court of Appeals of Indiana ruled that the burden was on Wilson to show

facts that give rise to an inference that the challenge was based on race after the trial court judge specified that defense counsel was required to state a racially neutral reason for peremptorily challenging the sole black juror on Wilson's panel of jurors. Appellant contends that the prima facie showing of purposeful racial discrimination is established where the sole juror of appellant's race is excluded by peremptory challenge and the trial court has placed on opposing counsel the burden to come forward with a neutral basis for the challenge. To place the burden of proof upon the minority litigant to prove the challenge was not racially motivated under such circumstances is a denial of the equal protection of the laws.

September 24, 1991.

BY: (s) Charles C. Wicks
Charles C. Wicks
Attorney for Appellant
514 South Main Street
P.O. Box 1884
Elkhart, Indiana 46515
Telephone: (219) 295-6924

Proof of Service

I, Charles C. Wicks, counsel for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of September, 1991, I served counsel for the Appellee, John D. Ulmer, counsel for the Appellee, at his address, 130 North Main Street, Post Office Box 575, Goshen Indiana 46526 Three (3) copies of Appellant's Petition for Writ of Certiorari.

VERIFIED PROOF OF SERVICE OF FILING A
PETITION FOR WRIT OF CERTIORARI

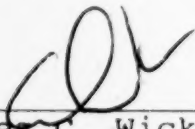
I, Charles C. Wicks, being duly sworn upon my oath, allege and say:

1. That I am a member of the Bar of the United States Supreme Court.

2. That on the 24TH day of September, 1991, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to the Clerk of this court forty (40) copies of Appellant's Petition for Writ of Certiorari within the time allowed for filing.

3. That, in addition, I deposited at the United States Post Office, Elkhart, Indiana, first class postage prepaid and properly addressed to John D. Ulmer, counsel for the Appellee, at his address, 130 North Main Street, Post Office Box 575,

Goshen, Indiana 46526 Three (3) copies of
Appellant's Petition for Writ of Certiora-
ri.

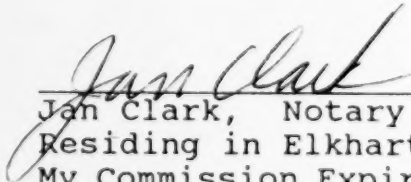


Charles C. Wicks
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STATE OF INDIANA
COUNTY OF ELKHART

Before me, a Notary Public in and for
said County and State, personally appeared
Charles C. Wicks who acknowledged the
execution of the foregoing pleading or
paper and who, having been duly sworn,
stated that any representations therein
contained are true.

Witness my hand and Notarial Seal
this 24th day of September, 1991.



Jan Clark, Notary Public
Residing in Elkhart County, In.
My Commission Expires: 11-2-92

②
No. 91-524

Supreme Court, U.S.
FILED
OCT 25 1991
OFFICE OF THE CLERK

**IN THE SUPREME COURT
OF THE UNITED STATES
1991 TERM**

TONI WILSONPETITIONER

v.

LEDGER D. KAUFFMANRESPONDENT

APPEAL FROM THE INDIANA COURT OF APPEALS

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

George E. Buckingham
Counsel of Record for Respondent
John D. Ulmer, Attorney for Respondent
Craig M. Buche, Attorney for Respondent
YODER, AINLAY, ULMER & BUCKINGHAM
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QUESTION PRESENTED FOR REVIEW

Whether the due process and equal protection guarantees of the Constitution are satisfied when the only black venireman at a black litigant's civil trial is removed by a peremptory challenge which is sustained by the trial court after opposing counsel gave multiple racially neutral reasons for the exercise of the peremptory challenge?

TABLE OF CONTENTS

	<u>Page(s)</u>
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Citations of Opinions and Judgments in Courts Below	1
Jurisdiction	1
United States Constitutional Provisions Involved	1
Statement of the Case	1
Summary of Argument	3
Argument	4
I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED FOR REVIEW	4
II. THE <u>BATSON</u> TEST WAS PROPERLY APPLIED	6
III. THE APPLICATION OF THE RULE SUGGESTED BY WILSON WOULD LEAD TO CHAOS IN THE JURY SELECTION PRO CESS AND NEVER-ENDING LITIGATION IN CONNECTION WITH THE SELECTION OF A JURY	11
Conclusion	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Batson v. Kentucky</u> 476 U.S. 79 (1986)	4,5,11,12
<u>Edmonson v. Leesville Concrete Company, Inc.</u> 111 S. Ct. 2077 (1991)	4,5
<u>Hernandez v. New York</u> 111 S. Ct. 1859 (1991)	7,9,11
<u>Minniefield v. State</u> 539 N.E. 2d 464 (Ind. 1989).....	10
<u>National Labor Relations Board v. Pittsburgh Steamship Company</u> 340 U.S. 503 (1951)	6
<u>Phillips v. State</u> 496 N.E.2d 87 (Ind. 1986).....	8,9
<u>Splunge v. State</u> 526 N.E.2d 977 (Ind. 1988).....	7,8
<u>Stamps v. State</u> 515 N.E.2d 507 (Ind. 1987).....	7

CITATIONS OF OPINIONS AND JUDGMENTS IN COURTS BELOW

The opinion of the court below is cited as Wilson v. Kauffman, 563 N.E.2d 610, (Ind. Ct. App. 1990), tran. denied (Ind. 1991).

JURISDICTION

An adequate statement of the jurisdictional grounds for this case is contained in the Petition for Writ of Certiorari.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution upon which the Petitioner relies is contained in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The appeal below and this Petition for Writ of Certiorari arise out of a case that was highly contested at the trial level on the issues of liability and damages. The Petitioner, Wilson, alleges that she was injured by the Respondent, Kauffman, as a result of an automobile collision on October 13, 1983.

This case was tried to a jury in the Elkhart Superior Court III in Elkhart County, Indiana in 1989. The trial court impaneled a prospective jury which contained one black individual by the name of Charlie Pulluaim. (R. 490). After the questioning of Pulluaim by Wilson's counsel, the trial judge gave counsel for both parties a card instructing them that any challenge of Pulluaim would have to be for a racially neutral reason. (R. 87 and 490). Counsel for Kauffman questioned Pulluaim and afterwards exercised a peremptory challenge to which Wilson objected. (R. 87-89). A copy of the voir dire examination of Pulluaim by Kauffman's counsel is contained in the Appendix to the Petition for Writ of Certiorari. The trial court held a recess, and counsel were advised to submit their positions in writing. (R. 89). Kauffman's counsel gave three reasons for challenging Pulluaim. First, counsel for Kauffman indicated that Pulluaim did not appear to understand his voir dire questions. Second, Pulluaim admitted that she knew of the Plaintiff, Wilson. Third, counsel for Kauffman believed that the next potential juror, the wife of a retired physician, might be a more qualified juror since much of the case was to be based on medical information. (R. 491). Counsel for Wilson objected to the peremptory challenge of Pulluaim claiming that Kauffman had failed to establish a racially neutral reason for removing Pulluaim and claiming that there was no evidence to show Pulluaim was not fully qualified to serve. (R. 492-93). The trial judge not only found that the reasons given by counsel for Kauffman were racially neutral, but the trial judge also agreed that Pulluaim did not appear to understand the questions posed by Kauffman's counsel. (R. 89, 492, and 547). The trial judge sustained the peremptory challenge and excused Pulluaim. (R. 89 and 492).

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied for three reasons. First, no substantial question has been presented for review. The trial and appellate courts below applied the Batson rule in this case with respect to the peremptory challenge of Pulluaim. Thus, the appropriate legal standard was applied. Counsel for Kauffman gave three reasons for the peremptory challenge which the trial court found to be race neutral. The trial court found that the peremptory challenge was not racially motivated and thus sustained it. After noting the deference that should be afforded the trial court's determinations, the Indiana Court of Appeals affirmed. No substantial question has been presented for review as the Petitioner invites this Court to do nothing more than re-apply the Batson rule and re-weigh the evidence and the credibility issues involved with the peremptory challenge.

Second, the Batson test was properly applied. As was held by the Indiana Court of Appeals, Wilson failed to even establish a prima facie case of purposeful discrimination at the trial level as Wilson provided no facts or circumstances to raise an inference of purposeful discrimination. Wilson showed nothing more than the fact that both Wilson and Pulluaim were black. Although not having established a prima facie case, counsel for Kauffman still provided three (3) racially neutral reasons for the peremptory challenge. These reasons were that Pulluaim did not appear to understand the voir dire questions; that Pulluaim knew of the plaintiff, Wilson; and that the next prospective juror, being the wife of a physician, might be more qualified as much of the case was to turn on medical issues. All of the reasons given are race neutral and constitute a sufficient explanation for the exercise of the peremptory challenge. The trial judge not only accepted these reasons as race neutral but also specifically acknowledged the observation and agreed with

Kauffman's counsel that Pulluaim did not appear to understand all of the questions. The trial judge concluded that the peremptory challenge was not racially motivated and therefore sustained it. The determination that the peremptory challenge was not racially motivated is entitled to great deference as it turns on an evaluation of credibility which lies peculiarly within the trial judge's province. As the determination was not clearly erroneous, the exercise of the peremptory challenge should be sustained.

Third, the Petitioner's suggestion that a party exercising a peremptory challenge should be required to provide "clear and convincing evidence" for a peremptory challenge or a "good and sufficient reason" rather than a racially neutral reason is unsound. To elevate the standard in this way would essentially eliminate the use of peremptory challenges which help to assure the selection of a qualified and unbiased jury. In addition, such a standard would create chaos in the jury selection process as parties would spend more time with jury selection issues than on the merits of the case. The current standard under Batson of requiring a racially neutral reason with respect to the exercise of a peremptory challenge is adequate in these cases to protect an individual's due process and equal protection rights. For all of these reasons, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED FOR REVIEW.

Even before this Court held in Edmonson v. Leesville Concrete company, Inc. that the principles announced in Batson v. Kentucky apply to a civil trial, the Indiana Court of Appeals

applied Batson in this case at the appellate level. See Batson v. Kentucky, 476 U. S. 79 (1986); Edmonson v. Leesville Concrete Company, Inc., 111 S. Ct. 2077 (1991). Under the principles announced in Batson, a person alleging racial discrimination and objecting to a peremptory challenge has the initial burden of proving that he or she is a member of a cognizable racial group; that the opposing party has peremptorily challenged members of the objecting party's race; and that these facts and other relevant circumstances raise an inference that the opposing party used this practice to exclude veniremen from the jury because of race. Batson, 476 U.S. at 96. If these elements are proven, the party seeking to exercise the peremptory challenge must come forward with a racially neutral explanation. The explanation must relate to the particular case, but it does not need to rise to the level justifying exercise of a challenge for cause. Batson, 476 U.S. at 97. The trial judge will then have a duty to determine if purposeful discrimination has been established. Batson, 476 U.S. at 98. Contrary to Wilson's contention that the Indiana Court of Appeals improperly placed the burden of proof upon her, the burden of proof is on and has always been on the party alleging the discriminatory selection of the venire to prove the existence of purposeful discrimination. Batson, 476 U.S. at 93.

In this case, the trial judge found that racially neutral reasons were given for the exercise of the peremptory challenge of Pulluaim, and, consequently, sustained that challenge. In affirming the action of the trial court, the Indiana Court of Appeals applied Batson and determined not only that racially neutral reasons were given but also that Wilson failed to establish even a prima facie case of purposeful discrimination. Instead of presenting any substantial question for review in the Petition for Writ of Certiorari, Wilson instead invites this Court to now independently apply the Batson test although it has already been applied as the legal standard in the courts below.

Furthermore, the review sought by Wilson at this time seeks to have this Court in essence place itself in the shoes of the trial judge in weighing the evidence and determining credibility with respect to the issue of racial discrimination. In justifying the peremptory challenge, counsel for Kauffman at the trial level explained that Pulluaim did not appear to understand his questions. The trial judge acknowledged this observation and agreed that Pulluaim did not appear to understand all of the voir dire questions. When making such determinations as to a prospective juror's understanding of questions, instructions, legal principles, and other relevant matters, it is crucial that one have an opportunity to listen to the individual's answers and to personally observe the individual's demeanor. As it is the trial judge who listens to and personally observes voir dire and has the best opportunity to reach these conclusions, a reviewing court should give the trial judge's findings great deference. This Court has long considered a Writ of Certiorari to be an inappropriate vehicle to review factual findings. As stated in National Labor Relations Board v. Pittsburgh Steamship Company,

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498, 503 (1951).

This case is no different than others which turn upon the facts. A racially neutral explanation was given, and the trial judge not only accepted that explanation but also agreed with it. There is sufficient basis in the record to sustain the peremptory challenge.

II. THE BATSON TEST WAS PROPERLY APPLIED.

Applying the Batson standard as stated above, the Indiana Court of Appeals determined that Wilson failed to even establish a prima facie case of purposeful discrimination at the trial level. This determination was based upon Wilson's failure to show any facts that would give rise to an inference that the peremptory challenge was based upon race. Although Wilson and Pulluaim were both black, this circumstance alone did not raise an inference of purposeful discrimination, and Wilson did not come forward with any facts to give rise to such an inference. This determination, however, has little significance at this stage in the case as counsel for Kauffman provided racially neutral reasons for the peremptory challenge. In such circumstances, the preliminary issue of whether a prima facie showing has been made becomes moot. Hernandez v. New York, 111 S.Ct. 1859 (1991).

At the trial level, counsel for Kauffman gave three racially neutral explanations for exercising the peremptory challenge of Pulluaim. The first reason given by Kauffman's counsel was that Pulluaim did not appear to understand his voir dire questions. The trial judge specifically acknowledged and agreed with this observation. The Indiana Supreme Court has held that a prospective juror's difficulty in understanding and following the proceedings and a prospective juror's failure to exhibit a sufficient comprehension of the burden of proof constitute sufficient grounds for the legitimate exercise of a peremptory challenge in cases where racially neutral reasons must be provided. Splunge v. State, 526 N.E. 2d 977, 980 (Ind. 1988); Stamps v. State, 515 N.E. 2d 507, 510 (Ind. 1987). This case parallels those cases in many ways, not the least of which is the fact that Pulluaim did not appear to understand certain portions of the voir dire questions from Kauffman's counsel, especially those dealing with the burden of proof:

MR. ULMER: And will you hold Ms. Wilson to

the burden that if she's claiming injury she has to establish that they were caused by Mr. Kauffman's conduct?

MS. PULLUAIM: Yes

MR. ULMER: And if she does not establish that, she can make no recovery? (No Response.) Well, if the Court would so instruct you that before a plaintiff may recover, the plaintiff is responsible and has the burden of proving that the injuries or damages she claims were caused by the defendant, would you follow that instruction . . .

MS. PULLUAIM: Yes.

MR. ULMER: . . . And if she has not established that burden, would you vote to not award her any money?

MS. PULLUAIM: I would have to hear all of the facts before I could say. (R. 88).

Pulluaim failed to answer one of the voir dire questions. Furthermore, her last response above could be interpreted to mean that she might be swayed by factors other than the evidence such as sympathy, bias, or other extraneous matters. The trial judge agreed with counsel's observation that Pulluaim did not appear to understand the voir dire questions. The explanation given was racially neutral, and the trial judge was in the best position to determine the validity of that explanation.

The second racially neutral reason given by counsel for Kauffman was that Pulluaim knew of Wilson. In Splunge v. State, the Indiana Supreme Court held that it was reasonable for a prosecutor to dismiss a juror that was acquainted with the defendant. Splunge v. State, 526 N.E.2d 977, 980 (Ind. 1988). In Phillips v. State, the Indiana Supreme Court determined that there was nothing in the record to indicate that a prosecutor removed three blacks from the jury panel on the basis of racial

discrimination where it was shown that they were either acquainted with or familiar with a potential witness. Phillips v. State, 496 N.E.2d 87 (Ind. 1986). In this case, Pulluaim admitted on voir dire that she knew of Wilson. Splunge v. State and Phillips v. State stand for the proposition that where a potential juror is "acquainted with" or "familiar with" participants in a trial, that fact will serve as a reasonable and racially neutral reason for excluding the potential juror. Thus, the fact that Pulluaim knew of Wilson was a sufficient reason, and a racially neutral reason, for peremptorily challenging Pulluaim.

Wilson's claim that using this rationale as a basis for a peremptory challenge would necessarily exclude large numbers of minority persons from jury service and would deprive a litigant of the constitutional right to jury selection on other than race-identity qualifications is misguided. First, it is inappropriate to ignore the fact that the reason given is racially neutral. Any individual, regardless of race, could know of a litigant, and in such circumstances, the exercise of a peremptory challenge against one who knows of a litigant would be a reasonable, racially neutral action. Second, Wilson's argument is highly speculative when one considers the fact that potential jurors are selected on a county-wide or district-wide basis and not merely from a small community. Finally, the argument is legally insufficient as one "... must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact...'" Hernandez v. New York, 111 S.Ct. 1859 (1991). For all of these reasons, the fact that Pulluaim knew of Wilson was a sufficient racially neutral reason for the peremptory challenge of Pulluaim.

Finally, counsel for Kauffman gave as an explanation for the peremptory challenge that the next prospective juror was the wife of a physician - that a lot of the case turned on medical information. Counsel for Kauffman believed that such a juror

might be more qualified for this case than Pulluaim. "Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial." Minniefield v. State, 539 N.E. 2d 464, 466 (Ind. 1989) (emphasis added). Since there was to be a considerable amount of conflicting medical testimony in the trial, counsel for Kauffman felt the individual qualifications of the potential jurors was of great importance. Therefore, Kauffman's counsel concluded that the wife of a retired physician might be more qualified as a juror than Pulluaim; especially since Pulluaim had responded in the negative to the following question from Wilson's attorney: "You don't have any training of any medical type, do you?" (R. 84). While Kauffman's counsel did not question Pulluaim about her medical knowledge, he could rely upon Pulluaim's answer to questions from Wilson's attorney. While the Indiana Court of Appeals noted that this third reason for challenging Pulluaim might not have been sufficient to show the reason was not racially motivated because Kauffman could have struck any of the prospective jurors in order to assure the physician's wife was on the panel, the Court of Appeals did so without the knowledge that "backstriking" was not allowed. Under the local rules of the trial court, Kauffman would not have been permitted to strike any of the jurors that had already been seated on the panel. As Pulluaim was the last or one of the last jurors that would have been seated, Kauffman would not have been able to strike any of the jurors in order to assure that the physician's wife would be on the panel. For all of these reasons, the third explanation given by counsel for Kauffman was a racially neutral reason which supports the peremptory challenge of Pulluaim.

Wilson's argument that the Indiana Court of Appeals improperly placed the burden of proof upon her to show racial discrimination is without merit. Under Batson, the burden of proving a prima facie case as well as the ultimate burden of

proving purposeful discrimination is upon the party who alleges discrimination. Batson v. Kentucky, 476 U.S. 79, 93 (1986); Hernandez v. New York, 111 S.Ct. 1859 (1991). In this case, three independent racially neutral reasons were given for the peremptory challenge of Pulluaim. As stated by this Court in Hernandez,

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. Hernandez, 111 S.Ct. 1859 (1991).

The trial court judge concluded that the exercise of the peremptory challenge was not racially motivated and sustained it. The Indiana Court of Appeals likewise found that the peremptory challenge was not racially motivated and affirmed the decision of the trial judge. As stated in Hernandez, the trial court findings on the issue of discriminatory intent largely turn on an evaluation of credibility which lies peculiarly within a trial judge's province. Hernandez, 111 S.Ct. 1859. The trial judge's determination is entitled to great deference and is to be reviewed on the basis of a clearly erroneous standard. As shown above, there was no error committed by the trial judge nor by the Indiana Court of Appeals and, thus, the Petition for Writ of Certiorari should be denied.

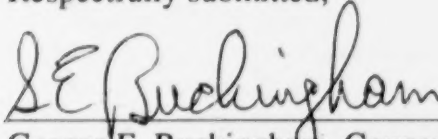
III. THE APPLICATION OF THE RULE SUGGESTED BY WILSON WOULD LEAD TO CHAOS IN THE JURY SELECTION PROCESS AND NEVER-ENDING LITIGATION IN CONNECTION WITH THE SELECTION OF A JURY.

At several points in the Petition for Writ of Certiorari, Wilson suggests that the standard of a racially neutral reason for a peremptory challenge should be elevated to one requiring "clear and convincing evidence" for the peremptory challenge or a "good and sufficient reason." (Petition for Writ of Certiorari, pp.14-15). To elevate the standard in such a way for the exercise of a peremptory challenge in cases where discrimination is alleged in the jury selection process would essentially eliminate the use of peremptory challenges altogether. To do so would be unwise as peremptory challenges have traditionally been viewed as a means of assuring the selection of a qualified and unbiased jury. Batson, 476 U.S. at 91. Such a standard would create chaos in the jury selection process and lead to unending challenges, issues, and appeals over the legal parameters of the standard and the legal sufficiency of the reasons and the evidence used to exercise a challenge. Rather than focusing on the merits of the case, the selection of the jury would become a preeminent issue. Appeals would be the rule of the day as parties appealed the constitution of the jury created by the peremptory challenges that were either allowed or disallowed. Creating such chaos, however, is not necessary as the current standard requiring a racially neutral reason for the exercise of a peremptory challenge in such cases is adequate to protect an individual's due process and equal protection rights.

CONCLUSION

For all of the foregoing reasons, the Respondent, Ledger D. Kauffman, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

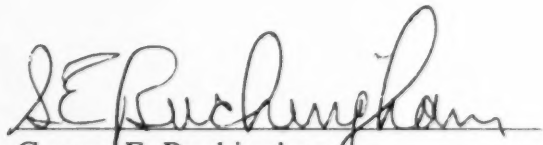


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PROOF OF SERVICE AND FILING

The undersigned, George E. Buckingham, Counsel of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 25th day of October, 1991, he served counsel for the Petitioner, Charles C. Wicks, at 514 S. Main Street, P.O. Box 1884, Elkhart, Indiana 46515 with three (3) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari in accordance with Supreme Court Rule 29.3 and 29.5 by depositing the same in United States mail with first class postage prepaid and properly addressed.

The undersigned, George E. Buckingham, Counsel of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby further certifies that on the 25th day of October, 1991, he filed forty (40) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari, which is within the time allowed for the filing of said Brief, by depositing the same in United States mail, with first class postage prepaid, and properly addressed to the Honorable William K. Suter, Clerk, Supreme Court of the United States, Washington D.C. 20543 all in accordance with Supreme Court Rule 29.2


George E. Buckingham